88-4

No.———

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

———o———

VAN VOORHIS & SKAGGS, a law partnership,

Petitioner,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporate instrumentality of the United States of America,

Respondent.

———o———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

———o———

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QUESTIONS PRESENTED

1. Whether the Federal Savings and Loan Insurance Corporation ("FSLIC"), acting as receiver, exceeded its statutory authority by attempting to rescind a retainer agreement between a savings and loan and two law firms and demanding the repayment of attorneys' fees, where FSLIC failed to demonstrate the agreement could be rescinded under state law.

2. Whether FSLIC's attempt to rescind the attorneys' fee agreement and terminate the attorneys' services impermissibly interferes with a savings and loan's relationship with its attorneys and results in a denial of the savings and loan's due process rights.

3. Whether the Ninth Circuit denied Petitioner its constitutional right to a trial on material issues by improperly ordering a judgment entered in favor of FSLIC, the party against whom summary judgment had been entered in the District Court.

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VAN VOORHIS & SKAGGS, a law partnership,

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v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporate instrumentality of the United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner Van Voorhis & Skaggs respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals

for the Ninth Circuit, entered in the above-entitled proceedings on February 4, 1988.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit reversing the judgment of the District Court is reported at 838 F.2d 395 (9th Cir. 1988) and is reprinted in the appendix hereto, p. 1a, *infra*.

The order of the Court of Appeals for the Ninth Circuit denying Petitioner's Petition for Rehearing and Request for Modification of Order is reported at 842 F.2d 239 (9th Cir. 1988) and is reprinted in the appendix hereto, p. 8a, *infra*.

The order of the United States District Court for the Northern District of California (Williams, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 19a, *infra*.

JURISDICTION

The District Court had jurisdiction over FSLIC's claims against Petitioner under 12 U.S.C.A. § 1730(k)(1) (West 1980) and 28 U.S.C.A. § 1331 (West 1981 & Supp. 1988) and § 1345 (West 1976). On May 14, 1986, the District Court granted Petitioner's motion for summary judgment, and on October 2, 1986, it ordered that Respondent's action be dismissed on the merits. Final judgment was entered November 19, 1986.

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[1] In addition to the parties named in the caption, the law firm Angell, Holmes & Lea was a defendant in the District Court and an appellee in the Ninth Circuit. Counsel is advised that Angell, Holmes & Lea has settled and has no further interest in this case.

On Respondent's appeal, the Ninth Circuit, on February 4, 1988, entered a judgment and an opinion reversing the Northern District's judgment and remanding the case for a new judgment consistent with its opinion. On March 29, 1988, the Ninth Circuit denied Petitioner's Petition for Rehearing and Request for Modification of Order and directed the District Court to enter judgment in favor of Respondent.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C.A. § 1254(1) (West 1981).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The text of the relevant constitutional provision, statutes, regulations, and rules is set forth in the appendix hereto, p. 26a.

STATEMENT UNDER RULE 28.4(b)

Since the Ninth Circuit's interpretation of 12 U.S.C. § 1729 draws into question the constitutionality of that statute, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

1. The Underlying Actions

On January 26, 1982, the Board of Directors of Fidelity Savings & Loan Association unanimously adopted a resolution authorizing its president to negotiate retainer agreements with legal counsel for the purpose of pursuing claims on Fidelity's behalf against the Federal Home Loan Bank of San Francisco, the Federal Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation ("FSLIC"). ER 177-178.[2] Fidelity had concluded that excessive loan rates imposed on it by the Federal Home Loan Bank of San Francisco, combined with a general downturn in the savings industry, were depleting Fidelity's net worth, endangering its ability to continue normal loan operations, and exposing it to regulatory action by the Bank Board and FSLIC. ER 178; SER 218.

On March 26, 1982, pursuant to the foregoing authority, the president of Fidelity negotiated a retainer agreement with two law firms, Angell, Holmes & Lea and Petitioner, Van Voorhis & Skaggs, to pursue Fidelity's claim against the Federal Home Loan Bank of San Francisco and, in the event government action resulted in Fidelity's assets being placed in receivership, to challenge the appointment of FSLIC as receiver. SER 208-209. The agreement provided each firm would receive a $250,000 retainer and a contingent fee equal to 10% of the sums

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[2] "ER" refers to the Excerpts of Record and "SER" to the Supplemental Excerpts of Record filed by the parties in the Ninth Circuit. See Rule 30-1, Local Rules of the United States Court of Appeals for the Ninth Circuit.

recovered in the underlying litigation.[3] Insofar as the retainer was concerned, the agreement stated:

> The parties to this Agreement understand that by undertaking the representation of Fidelity Savings against any of the entities named in 1.1 above, Attorneys may prejudice their ability to be retained in the future by private parties, government agencies, or both, in connection with the savings and loan industry and related legal fields. The parties also appreciate that FSLIC, or some other person, may challenge the validity of this Agreement, and therefore Attorneys are accepting risks hereunder they would not normally accept. Attorneys accept those risks in consideration of payment in full of the fees provided above in paragraph 2.1 [the $500,000 retainer] and in consideration of the provision that these fees are deemed to be earned in full when paid. Fidelity Savings understands that Attorneys would not enter into this Agreement but for these conditions. SER 211-212.

On April 9, 1982, the firms initiated litigation on Fidelity's behalf against the Federal Home Loan Bank of San Francisco. *Fidelity Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 689 F.2d 803, 805 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983). Four days later, on April 13, 1982, the Savings and Loan Commissioner for the State of California seized Fidelity's assets and appointed FSLIC receiver. *Id.* at 805-807. Twenty minutes later, the Federal Home Loan Bank Board independently appointed FSLIC federal receiver pursuant to 12 U.S.C. § 1729(c)(2), abrogated the State's control over the institution, and transferred Fidelity's assets to a newly created federal

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[3] An addendum to the agreement provided the 10% contingent fee provision did not become operative until six months after initiation of the first legal proceedings contemplated by the agreement. SER 215.

mutual association. *Id.* at 807. After its seizure of Fidelity's assets, FSLIC purported to discharge the firms by letter, demanding they perform no further services for Fidelity and that they return the retainer fees. ER 155, 158.

In response to FSLIC's "termination" letters, the law firms advised FSLIC that its appointment as receiver was illegal, and that the firms had a contractual duty to continue to perform legal services on Fidelity's behalf. ER 163. There was no response from FSLIC to the firms' letters. Indeed, as discussed below, it was not until a year-and-a-half later that FSLIC took any action to indicate its rejection of the law firms' position that they were duty bound to continue their representation. ER 1. By that time, however, most of the legal services had already been completed and the retainers more than exhausted. SER 1-87.

During the first few months after their engagement as counsel, Petitioner and Angell, Holmes & Lea performed an extensive amount of legal work on Fidelity's behalf, prosecuting Fidelity's claim against the Federal Home Loan Bank of San Francisco, and in addition filing a separate suit for Fidelity seeking dissolution of the federal receivership. *Fidelity Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 689 F.2d 803 (9th Cir. 1982); ER 91. The latter action was filed on April 18, 1982 and the firms were initially successful in persuading the District Court to invalidate the receivership. However the Ninth Circuit reversed that decision and remanded the case for further proceedings.[4] On July 19, 1984, the parties stipulated that fur-

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[4] The District Court initially held that the procedural prerequisites for appointment of a receiver had not been satisfied, and

(Continued on following page)

ther action on Fidelity's challenge to the receivership would be stayed pending final disposition of its separate claim against the Federal Home Loan Bank of San Francisco. Appellant's Opening Brief 12.[5] When Fidelity's action against the bank was ultimately resolved in favor of the bank, Fidelity's action to dissolve the receivership was voluntarily dismissed. Appellant's Opening Brief 12.

2. The Proceedings Below

On September 19, 1983, more than a year and five months after the purported rescission of Petitioner's contract with Fidelity, and after a substantial portion of the proceedings in the receivership action had already taken place, FSLIC filed the instant suit in San Francisco Superior Court, seeking repayment of the firms' retainer fees. ER 1. The case was subsequently removed to federal court. ER 324.

For one-and-one-half years, the government took no action to pursue its claim. Finally, in April 1985, more than one-and-one-half years after initiating its claim, FSLIC moved for partial summary judgment on the issue of its authority to terminate the retainer agreement as well as

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ordered FSLIC removed as receiver. On appeal, the Ninth Circuit reversed the District Court's judgment and remanded the case for a determination whether any of the statutory grounds existed for the appointment of a receiver. *Fidelity Sav. and Loan Ass'n. v. Fed. Home Loan Bank Bd.*, 540 F.Supp. 1374 (N.D.Cal. 1982), *rev'd and remanded*, 689 F.2d 803 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983).

[5] Pursuant to a prior stipulation between Fidelity, FSLIC, and the Federal Home Loan Bank Board, Fidelity's shareholder, Fidelity Financial Corporation, was substituted as plaintiff in the suit against the Federal Home Loan Bank of San Francisco. ER 254.

to demand repayment of the fees. ER 74. While the District Court assumed, without deciding, that the "earned upon payment" provisions of the retainer agreement might conflict with FSLIC's statutory powers, it nevertheless denied FSLIC's motion for summary judgment on the grounds that FSLIC had waived its right to recover the fees by not seeking to enforce its demands more promptly. App. 14a-17a. The court noted that in the three years since FSLIC purportedly terminated Petitioner's services, "FSLIC stood idly to the side while the defendants' litigation efforts in the other two cases, measured in terms of attorneys' fees accrued, grew to well over the $500,000 retainer amount." App. 16a-17a.[6] The court concluded that FSLIC's motion for summary judgment could not be granted because awarding judgment in favor of FSLIC would result in an inequitable forfeiture.

On or around April 10, 1986, Petitioner moved for summary judgment on the sole ground that the District Court's earlier ruling conclusively established FSLIC was not entitled to recoup the $500,000 retainer fee. ER 329. FSLIC did not oppose the motion and the motion was granted. ER 332-333, 335. Final judgment was filed November 19, 1986. App. 24a-25a.

On FSLIC's appeal from the summary judgment, the Ninth Circuit rejected the District Court's conclusion that FSLIC was estopped from pursuing its claims. It ruled that as long as FSLIC brought suit within the applicable

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[6] The two firms performed a total of $1,352,843 in legal services on Fidelity's behalf. SER 3, 193-194. As a result of the Ninth Circuit's decision, none of these services will be compensated.

statute of limitations period, there was nothing inequitable in failing to pursue the action more quickly. App. 5a.

While this ruling disposed of the only issue raised in the law firms' summary judgment motion, the Ninth Circuit proceeded to address and resolve other issues in the case, several of which had not been the subject of discovery, trial, or motion in the District Court. First, it ruled the "earned upon payment" provision in the retainer agreement was "contrary to the federal policy embodied in FSLIC's statutory authority to disaffirm all contracts and its regulatory authority to hire its own counsel." App. 5a. Second, it ruled that the power to rescind the agreement did not undermine Fidelity's statutory right to challenge the appointment of a receiver, 12 U.S.C.A. § 1464(d)(6)(A) (West Supp. 1988), nor deprive it of its ability to retain counsel. App. 6a-7a. (The court noted that 12 U.S.C.A. § 1464(d)(8)(A) (West Supp. 1988) allowed the District Court to award attorneys' fees to the prevailing party in an action challenging appointment of a receiver, and in light of this provision, the savings and loan still had the ability to retain counsel on a contingent fee basis. App. 7a.) Finally, the court ruled that Petitioner, the party which had *moved* for summary judgment, had failed to demonstrate the existence of factual controversies with respect to any material issues in the case, including the issue of estoppel. App. 6a. The Court of Appeals accordingly remanded the case with instructions that judgment be entered in favor of FSLIC. App. 7a, 10a.

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REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S CONCLUSION THAT FSLIC HAS THE POWER TO RESCIND FULLY EXECUTED CONTRACTS, EVEN THOUGH FSLIC FAILED TO DEMONSTRATE RESCISSION WOULD BE PERMISSIBLE UNDER STATE LAW, CONFERS BROADER POWERS ON FSLIC THAN THOSE GRANTED THE AGENCY BY GOVERNING STATUTE AND REGULATIONS.

A. Governing Regulations Do Not Grant FSLIC The Power To Rescind Fully Executed Contracts Which Could Not Be Rescinded Under State Law.

FSLIC's powers as receiver of a failed savings and loan institution are set forth in 12 C.F.R. § 569a.6. Subdivision (a)(1) of the regulation authorizes FSLIC to "do all things desirable or expedient at its discretion to carry on the business of [an insured] institution . . ."; subdivision (c)(3) authorizes FSLIC to "reject or repudiate any lease or contract which it considers burdensome."

There is a marked distinction between the authority to "reject" (i.e., "terminate") a contract and the authority to "rescind" a contract. " 'Termination' occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On 'termination' all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives." Cal. Com. Code § 2106(3) (West 1978);[7] to the same effect, see *East-*

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[7] Cal. Com. Code § 2106(3) is adopted from the Uniform Commercial Code. See Cal. Com. Code, Introduction at LVII (West 1978).

ern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 968 (5th Cir. 1976); *Perfection Oil Co. v. Saam*, 264 F.2d 835, 838 (8th Cir. 1959) ("the word 'termination' . . . should be interpreted to mean the cancellation of a contract before the expiration of the term provided for in the contract . . . ."). Rescission, by contrast, "not only terminates further liability but restores the parties to their former position by requiring each to return whatever he received as consideration under the contract, or, where specific restoration cannot be had, its value." 1 Witkin, Summary of California Law, Contracts, § 869, at 781 (9th ed. 1987) and cases there cited; Restatement (Second) of Contracts § 376 (1981); *CBS, Inc. v. Merrick*, 716 F.2d 1292, 1296-97 (9th Cir. 1983) (Nelson, concurring); *Rosengarten v. Buckly*, 565 F.Supp. 193, 199 (D. Maryland 1982). The right to reject or repudiate a contract does not confer a right to rescind the agreement, i.e., to demand the return of money which has already been paid and earned. *See North Mississippi Sav. & Loan Ass'n. v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985) (the power under 12 C.F.R. § 569a.6(c)(3) to terminate a contract is akin to the power conferred by 11 U.S.C.A. § 365(a) (West 1979) in bankruptcy proceedings, which authorizes the trustee to "assume or reject any *executory* contract . . . of the debtor" (emphasis added)).[8]

As we now demonstrate, if 12 C.F.R. § 569a.6(c)(3) were construed to authorize rescission of fully executed contracts, even where rescission is not permitted under state law, the regulation would be invalid as it would exceed the authority conferred on FSLIC by Congress.

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[8] A contract is executory if performance remains due on both sides. *In re Alexander*, 670 F.2d 885, 887 (9th Cir. 1982).

B. The Power To Rescind Contracts Is Not Conferred By Statute.

12 C.F.R. § 569a.6 is designed to implement the powers granted FSLIC by 12 U.S.C.A. § 1729 (West 1980 & Supp. 1988.) Section 1729(b) provides, in pertinent part, that upon its appointment as conservator or receiver FSLIC has the power to "take over the assets *of*" an association (emphasis added), to "take such action as may be necessary to put it in a sound solvent condition," and to "make such other disposition of the matter as it deems appropriate." Section 1729(c)(3)(B) provides "the Corporation shall have authority to liquidate such institution in an orderly manner or to make such other disposition of the matter as it deems to be in the best interests of the institution, its savers, and the Corporation." None of these provisions empower FSLIC to rescind fully executed contracts or recoup assets which have been lawfully transferred to third persons. (Compare 11 U.S.C.A. § 548(a) (West 1979 & Supp. 1988), which authorizes a trustee in bankruptcy to "avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition" if certain specified conditions are met. Congress declined to grant FSLIC similar powers.

In addition to the powers conferred by subdivision (b) of the statute, 12 U.S.C.A. § 1729(d) provides that "[i]n connection with the liquidation of insured institutions, [FSLIC] shall have power to carry on the business of and to collect all obligations to the insured institutions . . . ." This provision of the statute would not permit FSLIC to rescind the "earned upon payment" provision

of the attorneys' fee contract unless Fidelity *itself* had the power under state law to rescind the agreement. As we now demonstrate, the Ninth Circuit's decision improperly grants FSLIC power to terminate such contracts even where rescission is not permitted under state law.

C. Fidelity Could Not Rescind The Retainer Agreement Without First Satisfying The Criteria Set Forth In California Civil Code § 1689. The Ninth Circuit Improperly Ruled That FSLIC Has The Power To Rescind The Contract Without Satisfying The Same Criteria.

California Civil Code § 1689 provides that a contract may be rescinded only if the consent of the rescinding party was "given by mistake, or obtained through duress, menace, fraud, or undue influence, if the consideration for the consent of the rescinding party "fails" or becomes "void," if the contract is "unlawful," or if "the public interest will be prejudiced by permitting the contract to stand." As we now demonstrate, since there is no question the "earned upon payment" provision of the contract is valid, the Ninth Circuit erred when it ruled FSLIC could rescind the agreement without regard to whether the further criteria listed in § 1689 were satisfied.

"Earned upon payment" contracts are entirely valid under California law. The state recognizes the existence of "true" retainer agreements which are paid not for the rendition of any services but "solely for the purpose of insuring the availability of the attorney for the matter." State Bar of California Rules of Professional Conduct, Rule 2-111, subd.(A)(3); App. 30. Since "the purpose of a [true] retainer is to compensate the attorney for loss of an opportunity to represent another client . . . a retain-

er is earned by the attorney when paid because the attorney is entitled to the money regardless of whether or not he or she actually performs any services for the client." 1 M. Bender, California Attorney Practice § 10.05[2], at 10-25 (1988); to the same effect, *see Baranowski v. State Bar,* 24 Cal.3d 153, 164 n.4, 593 P. 2d 613, 154 Cal.Rptr. 752, 757 n. 4, (1979); State Bar of California Rules of Professional Conduct Rule 2-111, subd.(A)(3); 1 California Civil Procedure Before Trial § 1.21, at 16 (Continuing Education of the Bar 1977); *cf.* Professional Ethics of the Florida Bar, Opinion 76-27, at 1046 (Sept. 15, 1976) ("a nonrefundable retainer . . . is understood as belonging to the lawyer and not subject to refund whether or not the lawyer actually has to perform the legal services contemplated").[9]

The retainer agreement in the present case was expressly designed to satisfy the requirements of a true retainer. Paragraph 2.3 of the agreement states:

> The parties to this Agreement understand that by undertaking the representation of Fidelity Savings against any of the entities named in 1.1 above, Attorneys may prejudice their ability to be retained in the

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[9] In denying the Petition for Rehearing, the Ninth Circuit stated that it "has already held that the sums involved were fees paid in advance and not retainers." App. 9a. The court did not so rule. App. 5a-7a. Moreover, since neither party addressed the foregoing issue in its summary judgment papers or submitted any evidence bearing on the issue, the Ninth Circuit in effect was holding that no "earned upon payment" contract can *ever* be deemed a true "retainer." As demonstrated above, this is contrary to California law. The Ninth Circuit's conclusion that the fees in this case were "paid in advance" is in reality just another way of saying that "earned upon payment" contracts can be rescinded by FSLIC without regard to the requirements of California law.

> future by private parties, government agencies, or both, in connection with the savings and loan industry and related fields. The parties also appreciate that FSLIC, or some other person, may challenge the validity of this Agreement, and therefore Attorneys are accepting risks hereunder they would not normally accept. Attorneys accept those risks in consideration of payment in full of the fees provided above in paragraph 2.1 [the $500,000 retainer] and in consideration of the provision that these fees are deemed to be earned in full when paid. Fidelity Savings understands that Attorneys would not enter into this Agreement but for these conditions. ER 220-221.

Since the foregoing "earned upon payment" provision of the retainer agreement was clearly valid, it follows that even though Fidelity, prior to imposition of the receivership, may have had a right to terminate the agreement and discharge its attorneys (*see Fracasse v. Brent*, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal.Rptr. 385 (1972)), it could not *rescind* the contract and insist the retainer fee be returned unless it first demonstrated that the amount of the fee was excessive and therefore violative of public policy, that the contract was entered into as a result of fraudulent conduct by the law firms, or that there was a failure of consideration. Cal. Civ. Code § 1689(b) (West 1985). Since Fidelity itself could not have insisted the fee be returned without making such a showing, it follows FSLIC should not have been permitted to rescind the contract without making the same showing. By ruling FSLIC can rescind contracts simply because it believes they are "burdensome" without regard to whether they can be rescinded under state law, the Ninth Circuit decision has the effect of conferring broader powers upon FSLIC than were granted the agency by Congress.

The Ninth Circuit's decision creates a dangerous precedent which is likely to generate confusion wtih respect to whether there are any limits on FSLIC's power to rescind fully executed contracts it deems to be "burdensome." The issue is particularly relevant in light of the rising number of troubled institutions for which FSLIC must act as receiver. While FSLIC has authority to assert control over the assets of such institutions and protect federally insured deposits, it should not be empowered to interfere with the due process rights of third persons with whom such institutions do business. Plenary review of the issues raised in the Ninth Circuit's decision is accordingly essential.

II.

THE NINTH CIRCUIT'S DECISION SANCTIONS AN UNCONSTITUTIONAL INTERFERENCE WITH FIDELITY'S DUE PROCESS RIGHT TO RETAIN AND CONSULT COUNSEL.

Both the Ninth Circuit's decision and FSLIC's demand letter on Petitioner are premised on the notion that FSLIC—as Fidelity's "successor in interest"—has the absolute power to terminate the attorney-client relationship entered into between Petitioner and the savings and loan, against the wishes of both. App. 2a, 5a; ER 155, 158. Given FSLIC's position as an adversary in the receivership proceedings, it would create grave constitutional problems if the Ninth Circuit were correct in its assumption that FSLIC has the absolute right to discharge its op-

posing party's counsel. As we now demonstrate, even if the Ninth Circuit's decision were narrowly read as only empowering FSLIC to recoup fees paid to retain such counsel, but not to actually discharge counsel, it would conflict with the savings and loan's statutory right to challenge appointment of the receiver.

When a federal receivership is imposed on a savings and loan association, it has both a statutory and constitutional right to challenge such appointment. 12 U.S.C.A. § 1464(d)(6)(A) (West Supp. 1988); *Fidelity Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 689 F.2d 803, 814 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983). In pursuing this claim, the association also has a right to retain and seek the advice of counsel. 28 U.S.C.A. § 1654 (West 1966); *Mosley v. St. Louis Southwestern Ry.*, 634 F.2d 942, 945 (5th Cir. 1981) ("The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process"). Participation of counsel is essential if a hearing is to be meaningful. As this Court observed in *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." Although these comments were made in the context of a criminal proceeding, they are equally applicable to civil litigation, where the factual and legal issues are often more complex than in criminal cases. *See* Swygert, *Should Indigent Civil Litigants In The Federal Courts Have A Right To Appointed Counsel*, 39 Wash. & Lee L. Rev. 1267, 1269 (1982). The Court of Claims has accordingly ruled that when a government con-

tractor elects to exercise its statutory right to challenge the Board of Renegotiation's determination that the contractor has earned an excess profit, the Board may not collect such excess profits prior to the court hearing where doing so would "destroy the capacity of an indigent corporation to litigate further . . . . This, in our opinion, would be an unconstitutional result, and the statute must be construed to avoid bringing it about." *Sandnes' Sons, Inc. v. United States,* 462 F.2d 1388, 1393 (Ct. Cl. 1972).

By construing 12 U.S.C.A. § 1729 (West 1980) to authorize seizure of a retainer fee designed to secure the services of an attorney, the Ninth Circuit has adopted a construction of the foregoing statute which produces an unconstitutional result.[9] In practical terms, if FSLIC has the power to rescind such contracts and limit attorneys to earning a contingent fee, then it has the power to make it economically impossible for thrift institutions to continue to utilize the services of their attorneys.[10] Moreover, since FSLIC itself has no obligation to pay an attorney whose challenge to a receivership proves unsuccessful,[11] it is

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[9] If it is possible to construe a statute in a manner that it is consistent with the Constitution, that construction must be adopted. *United States v. Clark,* 445 U.S. 23, 27 (1980).

[10] The right to representation by counsel recognized by the above cases includes the right to select the attorney who will provide such representation. *McCuin v. Texas Power & Light Co.,* 714 F.2d 1255, 1257 (5th Cir. 1983); *United States v. Laura,* 607 F.2d 52 (3rd Cir. 1979). The agreement in the present case makes clear that Fidelity's attorneys were unwilling to work on a purely contingent fee basis.

[11] *Telegraph Sav. & Loan Ass'n v. Schilling,* 807 F.2d 590 (7th Cir. 1987), *cert. denied,* — U.S. — (108 S.Ct. 73).

highly unlikely, once a receivership has been imposed and the association's assets have been frozen, that the association will be able to find another law firm to represent it. Given the complexity of the issues involved and the vast government resources available to FSLIC, it follows that terminating an association's relationship with its existing attorneys, while at the same time precluding the association from using assets seized by FSLIC to employ new counsel, effectively denies the association the opportunity to have a meaningful hearing challenging FSLIC's conduct, as required under the due process clause of the Fifth Amendment.[12]

III.

THE NINTH CIRCUIT ABUSED ITS DISCRETION BY DIRECTING THAT SUMMARY JUDGMENT BE GRANTED IN FAVOR OF FSLIC, THE PARTY APPEALING FROM THE SUMMARY JUDGMENT MOTION, WITH RESPECT TO ISSUES NEITHER PARTY HAD RAISED IN THE DISTRICT COURT, THEREBY DENYING PETITIONERS THE OPPORTUNITY TO DEMONSTRATE THAT MATERIAL ISSUES OF FACT EXISTED WITH RESPECT TO SUCH ISSUES.

In *Fountain v. Filson*, 336 U.S. 681 (1949), this Court ruled that it is an abuse of discretion for a Court of Appeals to award summary judgment in favor of a party

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[12] It is not being suggested that an association has an absolute right to set aside any amount of money it wishes to challenge a receivership. As demonstrated above, FSLIC has the power to rescind any attorney's fee agreement which the association itself could rescind under state law.

appealing an adverse summary judgment decision where in so doing the party who prevailed below is denied the opportunity to dispute facts material to his opponent's claim:

> There was no occasion in the trial court for Mrs. Fountain [the prevailing party] to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her. *Id.* at 683.

To the same effect, see *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 531-533 (1958), holding that when the Court of Appeals adopts a construction of a governing statute at variance with that of the District Court and thereby introduces new factual issues into a case, it may not grant judgment on the basis of the existing record but must remand the case to allow the parties an opportunity to litigate the new issues in the trial court.

Here, the District Court granted Petitioner's motion for summary judgment on the grounds that allowing FSLIC to rescind the agreement would result in an "enormous forfeiture." App. 16a. In so ruling, the District Court stated it was applying the rule that where a contract appears to contravene public policy, "the contract 'may or may not be treated as void, according to circumstances, and rescission with restoration of benefits may be granted or withheld as equity requires.' [Citation.] Among the factors to be considered in determining the

appropriate remedy . . . is 'whether denial of enforcement [of the contract] would be disproportionately harsh . . . .' [Citation.]'' App. 17a. In the present case, the District Court noted that FSLIC ''stood idly to the side while the defendants' litigation efforts . . . grew to well over the $500,000 retainer amount.'' App. 16a-17a. The District Court concluded that ''FSLIC was bound to do more than passively observe defendants' vigorous litigation efforts against its parent agency for over three years, before seeking an actual determination of its rights to the money that financed the litigation.'' App. 17a.

One of the principal issues on appeal was whether the trial court had in effect ruled that FSLIC was ''estopped'' from rescinding the attorneys' fee contract. FSLIC argued that while the District Court ''did not specifically hold that FSLIC was 'estopped' to assert the illegality of the 'earned upon payment' provision, its decision to enforce the provision must be analyzed as if it did.'' Appellant's Opening Brief at 30. It further argued that if estoppel was relevant, the Court of Appeals should rule FSLIC could be estopped only if ''in addition to demonstrating the traditional elements of the estoppel doctrine,'' Petitioner demonstrated that FSLIC was guilty of ''affirmative misconduct.'' *Id.*

Petitioner countered by arguing that the District Court's decision could be sustained on its own grounds without engaging in an estoppel analysis by simply weighing the public policy against enforcing the fee agreement (assuming such a policy existed) against the forfeiture that would result if enforcement were denied. Appellees' Brief 13-14. ''That is precisely what the district court did here and the undisputed record fully supports the

equitable result it reached." Alternatively, Petitioner argued that if an estoppel analysis were utilized, Petitioner should not be required to demonstrate that FSLIC was guilty of "affirmative" misconduct because FSLIC was not acting in its "sovereign" capacity as receiver of Fidelity. Appellees' Brief 19, n. 12. Additionally, even assuming affirmative misconduct was relevant, Petitioner argued there was sufficient evidence to support the conclusion that FSLIC had engaged in such misconduct.

Significantly, although the parties argued at length in their appellate briefs about whether and on what terms FSLIC could be subjected to the estoppel defense, neither party had specifically raised the estoppel issue at the District Court level in the context of their summary judgment papers, neither party had conducted any discovery on the issue, and neither party introduced any evidence bearing on whether FSLIC was guilty of "affirmative" misconduct in their respective summary judgment papers.

The Ninth Circuit not only agreed with FSLIC's contention that estoppel was the key factual issue in the case, it ruled there was no factual basis in the record to apply the doctrine against FSLIC, and ordered that judgment be entered in favor of the agency. The foregoing ruling is wrong in two material respects.

First, the ruling is premised on a misapprehension of the arguments raised below. The Ninth Circuit stated that the underlying basis for Petitioner's estoppel argument was the contention FSLIC had led it to believe it had been "rehired" by FSLIC to prosecute Fidelity's claim against the Federal Home Loan Bank of San Francisco. The Court of Appeals then ruled this theory was unreasonable, and on that basis found the estoppel defense without merit. App.

6a. In fact, the law firms *never* took the position they believed they had been "rehired" by FSLIC. To the contrary, in response to FSLIC's estoppel argument, the law firms' brief in the Ninth Circuit focused on FSLIC's total silence in the face of the firms' refusal to be fired, FSLIC's lengthy delay in filing suit, the deliberate nature of such inaction, and the adverse consequences it engendered. Appellees' Brief at 15-20. The Ninth Circuit failed to even address these issues.

Second, and perhaps more significantly, the Ninth Circuit granted summary judgment without according Petitioner the opportunity to demonstrate, at the District Court level, that there were triable issues of fact justifying entry of judgment *against* FSLIC on the estoppel issue. As noted above, the estoppel issue was not discussed in either parties' summary judgment motion, and neither party submitted evidence dealing with what FSLIC itself described as the "threshold" issue underlying estoppel, namely, whether FSLIC was guilty of "affirmative misconduct." Appellant's Opening Brief at 30. The Ninth Circuit's decision unfairly deprived Petitioner of the opportunity to develop and present evidence on this and other issues relevant to estoppel.[13]

Not only was Petitioner foreclosed from litigating the estoppel issue, the court also deprived Petitioner of the opportunity to develop and introduce evidence on numerous other issues not raised in the summary judgment

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[13] Moreover, even assuming Petitioner did raise the estoppel issue in its summary judgment motion, by definition it could present only such evidence as was uncontradicted, not that evidence indicating there was a triable issue of fact on that issue. Nonetheless, the Ninth Circuit ruled as though Petitioner had presented all of its evidence relating to estoppel.

motions. Those issues include: (1) the basis for FSLIC's conclusion that the fee agreement was "burdensome" within the meaning of 12 C.F.R. § 569a.6(c)(3); (2) whether FSLIC was unjustly enriched by virtue of its agreement to allow the Petitioner to continue to prosecute the action against the Federal Home Loan Bank of San Francisco; and (3) whether the fee agreement constituted a "true retainer" as opposed to an advance on fees. By purporting to resolve these issues without a factual record, the Ninth Circuit unfairly deprived Petitioner of its due process right to a trial on the merits. As this Court ruled in *Carter v. Stanton,* 405 U.S. 669, 671 (1972), in an analogous context:

> [S]ummary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. If this is the course the District Court followed, its order is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim. In this posture of the case, we are unconvinced that summary judgment was properly entered.

In light of the clear procedural error in this case, summary reversal would be warranted. *See Harris v. Pennsylvania R. Co.,* 361 U.S. 15, 17 (1959); *Keney v. New York,* 388 U.S. 440 (1967); R. Stern, E. Gressman, S. Shapiro, Supreme Court Practice 277-79 (6th ed. 1986).

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CONCLUSION

For the above reasons, petitioner requests this Court to issue a writ of certiorari to review the judgment and holding of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporate instrumentality of the United States of America,

Plaintiff-Appellant/ Cross-Appellee,

v.

ANGELL, HOLMES & LEA, a law partnership,

Defendant-Appellee/ Cross-Appellant,

and

VAN VOORHIS & SKAGGS, a law partnership,

Defendant-Appellee.

Nos. 87-1546; 87-1593

D.C. No. CV-83-4869-SW

OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer M. Williams, District Judge, Presiding

Argued and Submitted
January 14, 1987—San Francisco, California

Filed February 4, 1988

Before: J. Blaine Anderson, John T. Noonan, Jr. and David R. Thompson, Circuit Judges.

Opinion by Judge Noonan

COUNSEL

Daniel Johnson, Jr. and Robert L. Eisenbach III, Cooley, Godward, Castro, Huddleson & Tatum, San Francisco, California, for the plaintiff-appellant/cross-appellee.

Gerald A. Cohn, Phillips Cohn & Greenberg, Orinda, California, for the defendant-appellee.

James C. Martin, Crosby, Heafey, Roach & May, Oakland, California, for the defendant-appellee/cross-appellant.

OPINION

NOONAN, Circuit Judge:

Most clients would probably be startled by the proposition that they could not fire their lawyer; and even lawyers might find the proposition surprising. In any event, it is not the law of California, which holds that a client's power to discharge an attorney, with or without cause, "is absolute." *Fracasse v. Brent,* 6 Cal.3d 784, 100 Cal. Rptr. 385, 494 P.2d 9 (1972).

This proposition does not completely resolve this case, but it is at the heart of it. Here two California law firms entered into retainer agreements with their client, Fidelity Savings and Loan Association (Fidelity), were fired three weeks later, continued to do work claimed to be for the client's benefit, and seek to retain what they were paid. The strength of their position is that they arranged to be paid in advance. This arrangement, however, cannot affect the controlling principle.

At the end of 1981 Fidelity was in deep trouble, advised by independent auditors that it might cease to exist in the following year if adverse trends were not reversed. In

January and February of 1982 it lost over $9 million. The handwriting was on the wall. On March 23, 1982 it entered into the retainer agreement at issue here.

By this agreement the law firms of Angell, Holmes & Lea and Van Voorhis & Skaggs agreed to represent Fidelity in all actions against the Federal Home Loan Bank of San Francisco, the Federal Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation (FSLIC), the Savings and Loan Commissioner of the State of California, and any entity which acquired Fidelity, provided that the suits related to certain specific subjects including the appointment of a receiver for Fidelity. The contract provided that "the entire amount" should be "deemed to have been earned upon payment" and that none of the amount should be repaid to Fidelity or to any other person "regardless of whether attorneys are for any reason prevented from performing any or all of the services to be performed by attorneys under this agreement."

The contract went on to say that the parties "appreciate that FSLIC, or some other person, may challenge the validity of this agreement, and therefore Attorneys are accepting risks hereunder they would not normally accept." The contract noted that in the past FSLIC had "attempted to set aside such agreements." It stated that if FSLIC terminated any right of the lawyers to receive fees not as yet paid the lawyers might elect forthwith to terminate their services. The fees deemed earned when paid were $250,000 to each law firm. In addition, Fidelity agreed to pay the firms a contingent fee of 10 percent of any recovery.

Three weeks after the retainer contract was executed Fidelity was placed in a receivership with FSLIC as the receiver. *Fidelity Savings and Loan Association v. Federal Home Loan Association,* 689 F.2d 803-805-807 (9th Cir. 1982). As receiver, FSLIC took over all of the assets and liabilities of Fidelity and acquired the right to hire and fire counsel for Fidelity, 12 U.S.C. § 1729(d), 12 C.F.R. § 569a.6(a)(5). It effectively became the firms' client. As receiver it had the power to reject any contract it considered burdensome. 12 C.F.R. § 569a.6(c)(3).

On the same date that the receivership began, April 13, 1982, the special representative of the receiver wrote both law firms as follows:

> I hereby notify you that your employment by Fidelity in all capacities, and with respect to all legal matters, is hereby terminated, effective on the date of this letter. Without limiting the generality of the foregoing, you shall no longer represent Fidelity, or any successor in interest of Fidelity, in that legal action entitled *Fidelity Savings and Loan Association v. Federal Home Loan Bank of San Francisco, et al.,* Case No. C 82 1389 EFL, United States District Court for the Northern District of California.
>
> Each of your firms has received a cash payment of $250,000 from Fidelity. Demand is hereby made upon you to return those monies. If you have rendered legal services to Fidelity, please forward to me a statement supporting any request for payment.

The law firms responded to this notice by letter declaring that the receivership was illegal, that FSLIC had no authority to discharge them as attorneys, that they had a contractual obligation to represent Fidelity, and that they rejected the demand for return of the payments.

In the course of the next two years the two law firms did a large amount of litigation in matters relating to Fidelity. In all Van Voorhis & Skaggs did work billed at $452,834 and Angell, Holmes & Lea work billed at $900,000. The two firms resisted when FSLIC brought suit to recover the $500,000 paid in March 1982. The district court was impressed by the amount of time the law firms had put in and, viewing FSLIC's demands as asking for a (sic) inequitable forfeiture, gave summary judgment in the firms' favor. We review the law anew and find the district court in error.

As simply, clearly and unequivocably as words permit, FSLIC fired the two law firms on April 13, 1985 (sic) and asked for the money back. As long as FSLIC then brought suit within the time of the applicable statute of limitations, there was nothing inequitable in not immediately filing suit for the money. As early as March 23, 1982 when the firms designed the retainer contract they were on notice that FSLIC disapproved of this kind of agreement and would seek to void it. After April 13, 1982 the firms were not merely on notice; they were terminated. That they chose to believe that in some way they could keep the fees is not a factor that we should or will consider.

[1] The firms' attempt to assure by the contract either their continued employment or at least the retention of the fees is contrary to the federal policy embodied in FSLIC's statutory authority to disaffirm all contracts and its regulatory authority to hire its own counsel. Thus even if the fee provision did not invade the absolute liberty of a client to fire his lawyer, the contract would be unenforceable for reasons of public policy. Cal. Civil Code § 1689(b)(6). The ordinary rules governing a voidable

contract of this character then apply. Restitution is to be made. American Law Institute, *Restatement of Contracts, Second* (1981) § 199; cf. *In re Leasing Consultants Inc.*, 592 F.2d 103, 110 (2d Cir. 1979).

[2] The firms attach importance to a stipulation entered into by FSLIC with Fidelity on March 15, 1983. By the terms of this stipulation Fidelity's shareholder, Fidelity Financial Corporation, was substituted as the plaintiff in a case originally between Fidelity and the Federal Home Loan Bank Board. The Bank Board pledged not thereafter to intervene in this case. By the terms of the stipulation the suit would continue "for the benefit of . . . the real party or parties in interest under the law at the time said judgment is satisfied." As the suit was unsuccessful, it cannot now be said who would have been the real party in interest if it had come to judgment; it could well have been Fidelity Financial Corporation, so that it is not clear that the suit was for the benefit of the receiver. In any event, there is nothing in the stipulation by which FSLIC as receiver rehired the firms to act for FSLIC in this lawsuit. The suit, by terms of the stipulation, was to be conducted with Fidelity's shareholder as plaintiff. No reasonable lawyer could have read the stipulation as a request by FSLIC for his services. The attempt by the firms to magnify, or rather to change, this stipulation into an indication that FSLIC as receiver wanted them as counsel has no basis in the record; and the firms' claim of estoppel—a claim premised on this misperception—has no basis.

A savings and loan association placed in federal receivership has the right to challenge the appointment of the receiver, 12 U.S.C. § 1464(d)(6)(A). The firms ask

how this statutory right may be exercised if the association has no funds for counsel. The answer is clear: counsel will be paid by court order if the challenge is successful. 12 U.S.C. 1464(d)(8)(A). The right to a fee is contingent. The firms complain: Good counsel, even competent counsel cannot be found on a contingency basis; if a lawyer is not certain of being paid, he will not handle this kind of case; to deprive the association of the use of its funds is to deprive it of all counsel.

The firms' own actions belie their argument. They signed the original retainer agreement with keen consciousness that FSLIC might challenge it; from the outset they were aware of the contingency that the agreement might not withstand scrutiny and that there were "risks" that the firms "would not normally accept." As of April 13, 1983 the firms knew they had been fired; they were still willing to litigate on the chance that the receivership might be vacated or the retainer agreement upheld. At some point the time they put into the cases far exceeded the money they had been paid. They were still willing to work on the contingency that in the end their theories might prevail. Lawyers working on a contingency basis cannot successfully argue that competent counsel in this field will not work on a contingency.

On its counterclaim Angell Holmes & Lea is entitled to reasonable reimbursement for services rendered before the receivership was instituted.

REVERSED AND REMANDED for judgment to be entered consistent with this Opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporate instrumentality of the United States of America,

Plaintiff-Appellant/ Cross-Appellee,

v.

Nos. 87-1546; 87-1593

ANGELL, HOLMES & LEA, a law partnership,

Defendant-Appellee/ Cross-Appellant,

D.C. No. CV-83-4869-SW

ORDER

VAN VOORHIS & SKAGGS, a law partnership,

Defendant-Appellee.

Before: J. Blaine Anderson, John T. Noonan, Jr. and David R. Thompson, Circuit Judges.

ORDER

Filed March 29, 1988

The appellees move to modify the opinion in this case, *Federal Savings and Loan Insurance Corp. v. Angell, Holmes & Lea,* 838 F.2d 395 (9th Cir. 1988), to guide further proceedings in the district court. They assert that the following questions are still open for litigation:

> whether FSLIC engaged in wrongful conduct in failing to prosecute the action in a timely manner; whether and to what extent FSLIC is responsible for minimizing damages; whether the unclean hands defense and other equitable defenses will bar or reduce

FSLIC's claim; whether the firms have a right to accept and keep a "true retainer" (as opposed to a fee advance) irrespective of discharge by the client or its successor, as permitted by California law; whether the firms are entitled to retain monies paid and earned, where the Association-payor was solvent and the contract was reasonable; whether the firms hired by the Association may legally retain monies earned which were paid out of shareholders' assets, and where no depositor losses were threatened or incurred; whether the statutory language of 12 U.S.C. § 1729(d) authorizes the adoption of a regulation that allows FSLIC to avoid contracts on the sole ground that they are "burdensome"; whether FSLIC can prove that the contract it sought to avoid was "burdensome" and therefore voidable; whether the regulation upon which FSLIC bases its authority to avoid "burdensome" contracts is constitutional; whether FSLIC was unjustly enriched by virtue of its agreement to allow the firms to continue the prosecution of the "Bank" case; and, whether the firms are entitled to a credit for costs.

The judgment of the court is dispositive of these issues. FSLIC did not fail to prosecute the action in a timely fashion. There is no issue of FSLIC's "minimizing damages"; FSLIC was entitled to restitution of the sums in the hands of the law firms. There is no unclean hands defense that the firms may raise at this time; the assertion that such a defense might exist appears to be a restatement of the firms' contention that FSLIC was estopped. The court has already held that the sums involved were fees paid in advance and not retainers. The court has already held that the firms cannot retain the money "as paid and earned," except for what was earned prior to the receivership. The other issues are frivolous restatement of arguments already presented. The firms are

not entitled to "credits for cost" after April 13, 1982 when their employment was ended.

The appellees' motion to modify the opinion is denied. The district court is directed to subtract from the amount paid by Fidelity a sum, not to exceed $25,000, equal to the reasonable value of the services of the firms between March 22, 1982 and April 13, 1982. The firms are to be directed to return their respective shares of the remaining sum with legal interest from April 13, 1982.

Any further proceedings in the district court shall be in accordance with the opinion and this order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporate instrumentality of the United States of America,	)	Nos. 87-1546, 87-1593
Plaintiff-Appellant/ Cross-Appellee	)	
v.	)	DC# CV-83-4869-SW
ANGELL, HOLMES & LEA, a law partnership,	)	O R D E R
Defendant-Appellee/ Cross-Appellant,	)	(Filed Apr. 11, 1988)
and	)	
VAN VOORHIS & SKAGGS, a law partnership,	)	
Defendant-Appellee.	)	

Before: NOONAN, Circuit Judge

Appellees Angell, Holmes & Lea's and Van Voorhis & Skagg's motion of April 5, 1988 to stay the mandate is hereby DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION,	)	
Plaintiff,	)	No. C 83-4869 SW
v.	)	ORDER AND MEMORANDUM DENYING
ANGELL, HOLMES & LEA, et al.,	)	PLAINTIFF'S MOTION FOR PARTIAL
Defendants.	)	SUMMARY JUDGMENT

This case came before the court on August 21, 1985 on plaintiff's motion for partial summary judgment. Following oral argument, plaintiff's motion was denied. This memorandum briefly sets out the basis for the court's ruling.

Plaintiff Federal Savings & Loan Insurance Corporation (FSLIC) seeks partial summary judgment on its claim for return and restitution of attorneys' fees prepaid to defendant law firms pursuant to a March 26, 1982 Retainer Agreement between defendants and Fidelity Savings & Loan Association (Fidelity). The Agreement contained a provision which deemed these fees "earned upon payment." FSLIC, as receiver of Fidelity, notified defendants on April 13, 1982 that their "employment by Fidelity in all capacities, and with respect to all legal matters" was terminated as of that date, and demanded the return of the $250,000 paid to each of the two defendants. Defendants replied that they had a "duty" to represent

Fidelity, and rejected FSLIC's demand for return of the attorneys' fees.

On September 19, 1983, plaintiff filed this action in San Francisco County Superior Court. The matter was removed to this court by defendants on October 19, 1983, and related to other cases pending before the undersigned on November 8, 1983. Defendants assert, and plaintiff does not dispute, that defendants incurred well over $250,000 in attorneys' fees apiece in these related cases, over three years of litigation. *See* Declaration of Samuel L. Holmes in Support of Opposition to Plaintiff's Motion for Summary Judgment and Declaration of Palmer Brown Madden. The instant motion, seeking return and restitution of the portion of the $500,000 that had not been earned as of April 13, 1982, was filed on April 30, 1985.

DISCUSSION

Plaintiff's basic contention is that the "earned upon payment" provision of the Retainer Agreement is void as against public policy, and thus should not be enforced to defeat FSLIC's ability to terminate the Retainer Agreement. A "statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment." *United States v. Mississippi Valley Co.*, 364 U.S. 520, 563 (1961). Here, 12 U.S.C. § 1729(d) provides that FSLIC "shall have power to carry on the business of . . . the insured institutions . . . and to do all other things that may be necessary in connection therewith . . . ." FSLIC is authorized by regulation to preserve the assets of institutions taken into receivership, and is expressly given the "power to . . . [r]eject or repudiate any lease or contract which it considers burdensome." 12 C.F.R.

§ 569a.6(c)(3). Were there no earned upon payment provision, FSLIC could simply have exercised its authority to repudiate the retainer agreement, and recovered the unearned amounts. The earned upon payment provision thus has the effect of precluding FSLIC from exercising its full authority as receiver. At least at first blush, enforcement of the earned upon payment provision would thwart the public policy of the bankings laws to allow FSLIC to exercise *all* of the powers necessary to act on behalf of institutions taken into receivership.

However, defendants contend that returning the pre-paid fees to FSLIC would be improper on both constitutional and equitable grounds. First, defendants assert that to deprive Fidelity of the funds necessary to litigate is to deny the institution its due process right to retain counsel. Although this argument might have had some relevance if it had been raised prior to the expenditure of the pre-paid fees, the fact of the matter is that the money has been spent and "Fidelity", for better or for worse, has received all of the legal representation that $500,000 could buy. In short, it appears that the question of whether Fidelity's due process right to counsel would be violated by requiring defendants to return the $500,000 to FSLIC, is moot. On the record before the court, Fidelity would not be injured by an order of restitution, nor would its due process rights be violated.

Defendants' second contention is that FSLIC's failure to aggressively pursue recovery of the pre-paid fees constitutes a waiver of FSLIC's right to the $500,000. Although the court agrees that permitting recovery of the fees from defendants at this point would be inequitable, the court's analysis differs somewhat from that of defend-

ants. FSLIC by this motion seeks restitution of funds paid by Fidelity to the defendants. FSLIC informed defendants that they were "terminated" as of April 13, 1982. Although FSLIC does not contend that its presently-asserted claim for relief matured any later than that date, FSLIC did not file the instant lawsuit until September, 1983. In the interim, defendants performed the work contemplated by the Retainer Agreement, filing and pursuing two suits against FSLIC's parent agency, the Federal Home Loan Bank Board (FHLBB), challenging the latter's treatment of Fidelity and the subsequent appointment of FSLIC as receiver of Fidelity. *See Fidelity Savings & Loan Ass'n v. Federal Home Loan Bank of San Francisco,* C 82-1389 SW and *Fidelity Savings & Loan Ass'n v. Federal Home Loan Bank Board,* C 82-1592 SW. Following the filing of the instant suit and removal to this court, FSLIC did not file its motion for partial summary judgment until April, 1985. Again, during the interim, defendants performed the services contemplated by the Retainer Agreement. The uncontradicted record before the court shows that defendants spent well in excess of $250,000 apiece in prosecuting these suits.

When a contractual provision appears to contravene public policy, the contract "may or may not be treated as void, according to circumstances, and rescission with restoration of benefits may be granted or withheld as equity requires." *People v. Barenfeld,* 203 Cal. App. 2d 166, 21 Cal. Rptr. 501, 511 (1962). Among the factors to be considered in determining the appropriate remedy when a contract is found to violate public policy is "whether denial of enforcement [of the contract] would be disproportionately harsh in proportion to the illegality." *Home-*

stead Supplies, Inc. v. Executive Life Insurance Company, 81 Cal. App. 3d 978, 147 Cal. Rptr. 22, 29 (1978). The Restatement (Second) of Contracts is in basic accord with these principles: "A promise or other term of an agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement (Second) of Contracts § 178(1) (1978). "In weighing the interest in the enforcement of a term, account is taken of . . . (b) any forfeiture that would result if enforcement were denied . . . ." *Id.* § 178(2). *See also* § 178 comment e: "The interest in favor of enforcement becomes much stronger after the promisee has relied substantially on [its legitimate] expectations as by preparation or performance. The court will then take into account . . . any forfeiture by the promisee if he should lose his right to the agreed exchange after he has relied substantially on those expectations." The Court of Appeals for this Circuit indicated its agreement with this section of the Restatement, in *California Pacific Bank v. Small Business Administration*, 557 F.2d 218, 224 (9th Cir. 1977).

In the instant case, the public policy to the effect that FSLIC should have full authority to govern the affairs of institutions taken into receivership, does not outweigh the interest in enforcement of the earned upon payment provision, given the enormous forfeiture that would result from non-enforcement of that provision. Although such a forfeiture could have been avoided had FSLIC promptly sought an affirmative determination of its rights to the pre-paid attorneys' fees, FSLIC stood idly to the side while the defendants' litigation efforts in the other

two cases, measured in terms of the attorneys' fees accrued, grew to well over the $500,000 retainer amount. FSLIC has presented the court with no reason why it could not have sought a judicial determination of the retainer fee issue before the defendants performed under the Retainer Agreement. Rather, it waited until defendants in effect spent these funds before affirmatively seeking restitution. Although plaintiff demanded return of the funds in April of 1982 and filed this suit in September of 1983, these actions do not excuse FSLIC from seeking an affirmative determination of its rights with regard to the funds when it could have done so prior to the expenditure of the funds. "[A] person otherwise entitled to restitution is barred from recovery if he has failed to bring or, *having brought has failed to prosecute,* a suit for so long a time and under such circumstances that it would be inequitable to permit him now to prosecute the suit." Restatement of Restitution § 148(1) (1937) (emphasis added). Although FSLIC suggested at oral argument that it was defendants' burden to seek an early judicial determination of their right to the retainer fees, the court cannot agree. At least for the purpose of weighing the factors relating to the enforcement of the earned upon payment provision, FSLIC was bound to do more than passively observe defendants' vigorous litigation efforts against its parent agency for over three years, before seeking an actual determination of its rights to the money that financed the litigation.

Because FSLIC has not demonstrated its right to recover the $500,000 as a matter of law, its motion for partial summary judgment is therefore DENIED.

DATED: November 5, 1985.

/s/ Spencer Williams
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION,	)	No. C 83-4869 SW
Plaintiff,	)	ORDER GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT, AND RE-SETTING HEARING DATES
v.	)	
ANGELL, HOLMES & LEA, et. al.,	)	
Defendants.	)	

(Filed March 14, 1986)

Defendants' cross-motion for summary judgment on the causes of action raised by plaintiff's complaint is scheduled for hearing before the court on May 20, 1986. However, in light of plaintiff's May 8, 1986 statement of non-opposition to defendants' motion, defendants' cross-motion for summary judgment is hereby submitted without oral argument. Substantially for the reasons stated in this court's November 5, 1985 decision, defendants' motion is GRANTED.

In the court's view, this resolution of the issues raised in plaintiff's complaint essentially moots defendants' counterclaim for compensation for services rendered between April 1 and April 13, 1982. The $500,000 paid to defendants on March 26, 1982 presumably included the compensation defendants seek to recover by way of their counterclaim. Because the court has ruled that defendants are entitled to retain the $500,000, there appears to

be no further issue to litigate in this case. The parties shall appear in this court on June 4, 1986, at 10:00 a.m., to show cause, if any there be, why defendants' counterclaims should not be dismissed as moot. Alternatively, the parties may jointly submit to the court a proposed order dismissing defendants' counterclaims, along with a proposed form of Judgment. If such order and Judgment are submitted to the court no later than May 28, 1986, the June 4 hearing date will be vacated.

The Dismissal Calendar hearing noticed by the court for May 20, 1986 is hereby vacated.

IT IS SO ORDERED.

DATED: 14 May, 1986.

/s/ Spencer Williams
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION, a corporate instrumentality of the United States of America,

Plaintiff,

No. C 83 4869 SW

vs.

JUDGMENT

ANGELL, HOLMES & LEA, a Law partnership, VAN VOORHIS & SKAGGS, a law partnership, and DOES 1 through 100,

Defendants.

_____/

(Filed October 2, 1986)

Defendants' Cross-Motion for Summary Judgment was scheduled for hearing before this Court on May 20, 1986. On May 8, 1986 plaintiff filed a statement on non-opposition to defendants' motion. In light of plaintiff's non-opposition to defendants' motion, defendants' cross-motion for summary judgment was submitted to the Court without oral argument. In its order of May 14, 1986, the Court granted defendants' cross-motion substantially for the reasons stated in the Court's order of November 5, 1985.

The Court having granted defendants' cross-motion, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff's action be dismissed on the merits, and that defendants recover their costs.

DATED: OCT 2, 1986.

/s/ SPENCER WILLIAMS
United States District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION, a corporate instrumentality of the United States of America, Plaintiff, v. ANGELL, HOLMES & LEA, a law partnership, VAN VOORHIS & SKAGGS, a law partnership, DOES 1 through 100, inclusive, Defendants.	No. C 83 4869 SW ENTRY OF FINAL JUDGMENT AS TO ENTIRE ACTION (F.R.C.P. 58)

(Filed November 19, 1986)

This Court, acting through the Honorable Spencer Williams, United States District Judge, having entered summary judgment on October 2, 1986 in favor of defendants ANGELL, HOLMES & LEA ("AH&L") and VAN VOORHIS & SKAGGS ("VV&S") on the complaint of plaintiff FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION ("FSLIC"), and having entered summary judgment on October 3, 1986 in favor of counterdefendant FSLIC on the counterclaim of counterclaimant

AH&L, HEREBY ENTERS FINAL JUDGMENT AS TO THE ENTIRE ACTION PURSUANT TO F.R.C.P. 58.

DATED: November 19, 1986.

/s/ SPENCER WILLIAMS
UNITED STATES DISTRICT COURT
JUDGE

Constitutional Provision

The Fifth Amendment to the Constitution of the United States of America provides in pertinent part that:

> "No person shall be . . . deprived of . . . property, without due process of law;"

Statutes

12 U.S.C.A. § 1464(d)(8)(A).

> Any court having jurisdiction of any proceeding instituted under this subsection by an association or a director or officer thereof, may allow to any such party, which prevails, such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the association or from its assets.

12 U.S.C.A. § 1729(b)(1)(A) and (B). *Powers of Corporation on default of Federal Savings and Loan Associations.*

> (1) In the event that a Federal association is in default, the Corporation shall be appointed as conservator or receiver and as such—
>
> (A) is authorized—
>
> (i) to take over the assets of and operate such association;
>
> (ii) to take such action as may be necessary to put it in a sound solvent condition;
>
> (iii) to merge it with another insured institution;
>
> (iv) to organize a new Federal association to take over its assets;

(v) to proceed to liquidate its assets in an orderly manner; or

(vi) to make such other disposition of the matter as it deems appropriate; whichever it deems to be in the best interest of the association, its savers, and the Corporation; and

(B) shall pay all valid credit obligations of the association.

12 U.S.C.A. § 1729(c)(3)(B). *Powers of Corporation and Federal Home Loan Bank Board on default of their institutions.*

(3) In any case where the Corporation is appointed conservator or receiver of an insured institution pursuant to paragraph (1) or (2)—

* * *

(B) the corporation shall have authority to liquidate such institution in an orderly manner or to make such other disposition of the matter as it deems to be in the best interests of the institution, its savers, and the Corporation.

12 U.S.C.A. § 1729(d). *Additional Powers of Corporation.*

In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than

said Board, subject only to the regulation of such public authority.

California Civil Code § 1689. *Grounds for rescission.*

(a) A contract may be rescinded if all the parties thereto consent.

(b) A party to a contract may rescind the contract in the following cases;

(1) If the consent of the party rescinding, or if any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

(2) If the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds.

(3) If the consideration for the obligation of the rescinding party becomes entirely void from any cause.

(4) If the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause.

(5) If the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault.

(6) If the public interest will be prejudiced by permitting the contract to stand.

(7) Under the circumstances provided for in Sections 39, 1533, 1566, 1785,[1] 1789,[2] 1930 and 2314 of this code, Section 2470 of the Corporations Code,[3] Sections 331, 338, 359, 447, 1904 and 2030 of the Insurance Code or any other statute providing for rescission.

California Commercial Code § 2106(3). *Definitions.*

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

Regulations

12 C.F.R. § 569a.6(a)(1).

(a) *General.* The Receiver shall collect all obligations and money due such insured institution, and may:

(1) To an extent consistent with its appointment, do all things desirable or expedient at its discretion to carry on the business of such institution and to preserve and conserve the assets and property of every nature of such institution;

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[1] Repealed. See, now, California Commercial Code § 2610.

[2] Repealed. See, now, California Commercial Code §§ 2106, 2507, 2601, 2607, 2608, 2711, 2714, 2715, 2717.

[3] Repealed. See, now, California Commercial Code §§ 8301, 8315.

12 C.F.R. § 569a.6(c)(3).

(c) *Assets, claims and contracts.* The Receiver shall have power to:

(3) Reject or repudiate any lease or contract which it considers burdensome.

Rules

California Rules of Professional Conduct, Rule 2-111(3).

Withdrawal from employment.

(3) A member of the State Bar who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned. However, this rule shall not be applicable to a true retainer fee which is paid solely for the purpose of insuring the availability of the attorney for the matter.